A-732

No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

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SUPREME COURT, U.S.

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

Supreme Court, U.S.
FILED
1998
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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
April 14, 1998

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APPLICATION FOR STAY OF EXECUTION

Petitioner, Angel Francisco Breard, by counsel, moves this Court to issue an order staying Breard's execution, which is scheduled for April 14, 1998.

Breard, a citizen of Paraguay born in Argentina, filed his first, and only, federal habeas corpus petition on August 30, 1996, based in part upon Virginia's violation of the Vienna Convention on Consular Relations (the "Vienna Convention" or the "treaty") in connection with his case. Two weeks after Breard's petition was filed, the Republic of Paraguay, its Ambassador to the United States and its Consul-General filed a federal complaint (denoted hereafter as the Paraguay suit) based upon the same facts as Breard's Vienna Convention claim, seeking declaratory and injunctive relief against several officials of the Commonwealth of Virginia to vindicate rights conferred upon Paraguay and the Consul-General by the Vienna Convention. After the Fourth Circuit Court of Appeals affirmed the District Court's dismissal of both cases,[1] the Circuit Court for Arlington County set April 14, 1998, as the date for Breard's execution. A copy of this order is attached as Exhibit A.

The plaintiffs in the Paraguay suit filed a Petition for Certiorari in the Court on February 24, 1998. Republic of Paraguay v. Gilmore, No. 97-1390. On March 22, 1998 they filed an Application for Stay of or Injunction Against Execution pending Disposition of Petition for Certiorari. On March 11, 1998, Breard filed a Petition for a Writ of Certiorari in the Court. Breard v. Greene, No. 97-8214. On March 23, 1998, Breard filed in the Court of Appeals an Application for a Stay of Execution which was denied on Friday, March 27, 1998. A copy of the order of the Court of Appeals is attached as Exhibit B.

Breard asks the Court to stay his scheduled execution to afford it the opportunity to consider both his Petition for Certiorari and that filed by Paraguay and its officials in a

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[1]Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).

thoughtful manner and without the pressure of an imminent execution date, and in the event the Court grants the petitions for *certiorari*, or either of them, the time required to render its decisions.

A stay of execution should be granted if it is reasonably probable that four members of this Court would consider any of the underlying issues sufficiently meritorious for a grant of *certiorari*, there is a significant possibility that the decision of the Court of Appeals will be reversed, and irreparable harm is likely to result if the decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Breard satisfies this standard with respect to all of the questions presented in his Petition for a Writ of Certiorari.

Breard's case raises an important issue not yet resolved by this Court concerning the unquestioning determination by the District Court and the Court of Appeals that the jurisprudential doctrine of procedural default overrides the dictates of the Vienna Convention. Breard argues in his Petition for Certiorari that the rights to consular notification and access granted by Article 36(1) of the Vienna Convention are not subject to the doctrine of procedural default because Article 36(2) of the treaty exempts its provisions from the operation of domestic laws that would deprive the consular notification requirement of "full effect."

As Judge Butzner of the Court of Appeals noted in his concurring opinion in this case,[2] the Convention affects Americans who travel abroad each year and who might be taken into custody by officials of another country. If America's domestic procedural rules bar any legal remedy when an alien in this country is convicted and given what some nations deem a "barbaric" sentence of death without the knowledge or intervention of his consulate, the

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[2]Breard v. Pruett, 134 F.3d at 622.

United States is in no position to protest if another country's procedural rules are used to the same effect against Americans detained abroad.

The interpretation and application of Article 36 of the Vienna Convention present important questions that it is reasonably probable that four members of this Court will consider sufficiently meritorious for a grant of *certiorari,* and there is a significant possibility that the decision of the Court of Appeals will be reversed. This Court ought to be able to consider carefully the issues raised both in this case and in Paraguay's case without the looming deadline of Breard's execution.

Assuming *arguendo* that Vienna Connection claims could be procedurally defaulted, Breard has asserted that the novelty of the claim provides cause for the default. Mr. Breard's trial counsel, appellate counsel, and state habeas counsel, like nearly all other criminal defense and habeas lawyers in the country, reasonably were unaware of the treaty's consular notification provision and would not have discovered it in the course of reasonable and diligent investigation. The continuing validity of, and application of, the novelty doctrine make it reasonably probable that four members of the Court will consider this issue meritorious for a grant of *certiorari*, and establish a significant possibility that the decision of the Court of Appeals will be reversed. See Reed v. Ross, 468 U.S. 1 (1984).

Finally, Breard asserts that the Virginia Supreme Court's method for performing the state-mandated proportionality review violates federal due process because it deprived him of his life and liberty interest in the procedure prescribed by statute for the review. This case gives this Court an opportunity to provide guidance concerning the extent to which the Due Process Clause requires compliance with proportionality review statutes. Because of the importance of this issue and the number of states employing similar statutes, it is reasonably probable that four members of the Court will consider the underlying issue sufficiently

meritorious for a grant of *certiorari*, and there is a significant possibility that the decision of the Court of Appeals will be reversed.

The final factor for the Court to consider in order to grant a stay of execution -- that irreparable harm is likely to result if the decision is not stayed -- is indisputable. Breard will die on April 14, 1998, unless his execution is stayed, while Virginia escapes responsibility for its flagrant violations of federal and international law and of its own statute.

CONCLUSION

For all these reasons, the Court should stay Breard's execution pending disposition of his Petition for a Writ of Certiorari.

Respectfully submitted,

ANGEL FRANCISCO BREARD

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CERTIFICATE

I certify that a copy of the foregoing was hand delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, on March 30, 1998.

Alexander H. Slaughter